No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN
Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Respondents pursuant to Rule 37.3 of this Court.[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, public interest law firm dedicated to protecting the free expression of *all* religious traditions, and the equal participation of religious people in public life and public benefits. Over its first decade, The Becket Fund has represented Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Sikhs, and others in cases involving the full range of religious freedom issues under federal and state constitutional and statutory law.

Amicus submits this brief to highlight: (1) that American governments routinely – indeed, inevitably – include religious elements as one component of their cultural expression more broadly; and (2) that such government expression that acknowledges the contributions of America's many religions to its culture is time-honored, ubiquitous, and reflects the full and ever-expanding range of American religious diversity. Aware of this broader history and context, courts should treat such expression with deference in order to respect the increasing religious diversity that they reflect.

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[1] All parties have consented to the filing of this brief. A consent letter from Petitioner is on file with the Court. A consent letter from Respondents is being filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

One can scarcely imagine a government that does not engage in some form of cultural expression, or a culture that does not have religion as a meaningful component. But even if one did exist, it would bear no resemblance to our government and culture.

American governments at all levels—federal, state, and local—engage in many forms of cultural expression, such as commemorating historical events, celebrating national heroes, and affirming the distinct contribution of its many ethnic groups. And because religious diversity and ferment is one of the distinguishing characteristics of American culture, government cultural expression routinely includes religious elements.

The purpose of this brief is to illustrate by examples the longevity, ubiquity, and diversity of the American tradition of allowing—rather than selectively excising—religious elements as part of government cultural expression.

This widespread pattern of government behavior does not represent the "endorsement" of any one religion or religion generally. Instead, it is simply the ongoing *recognition* and *acknowledgement* of the important role of America's many religions in its public life—activities that this Court routinely permits under the Establishment Clause.

In order to respect the flourishing of religious diversity that this government expression reflects, courts should review it with deference. Specifically, the reasonable observer should be deemed familiar with the broader phenomenon that ordinary cultural expression by government will frequently contain religious elements in a religiously diverse society. Monuments like the one at issue here should be viewed as merely one religious patch in the broader—

secular and religious—cultural quilt of our society.

ARGUMENT

I. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES NECESSARILY AND LEGITIMATELY REFLECTS THE RELIGIOUS DYNAMISM OF AMERICAN CULTURAL LIFE.

The Constitution generally affords federal, state and local governments plenary control over their own speech, and makes them primarily accountable to the electorate—not the judiciary—for the positions they choose to express. *See Board of Regents of Univ. of Wis. Sys.* v. *Southworth*, 529 U.S. 217, 235 (2000); *Rust* v. *Sullivan*, 500 U.S. 173, 192-95 (1991).

Government speech often involves cultural expression, in the form of public monuments, memorials, festivals, and others. And in a society like ours, where religious freedom and diversity are such cherished values, the variety of religious views and the ensuing debate among them inform and energize the broader culture in meaningful ways. *See Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) (recognizing "the religious nature of our people," and that "the spiritual needs of man" give rise to a "wide . . . variety of beliefs and creeds"). *See also New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (noting "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").[2]

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[2] Tocqueville similarly recognized the breadth and depth of the influence of religion in American public life:

> "I am sure that [Americans] think [religion] necessary to the maintenance of republican

Accordingly, government cultural expression will often reflect at least some religious aspects of the culture. Indeed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984).

Rather than require that these religious elements be targeted for special exclusion from government expression, our Constitution requires only that they not privilege one religion over others, or privilege the religious over the secular. *See Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."). *See also Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

Thus, the Constitution allows government to *recognize* and *acknowledge* the role of religions in cultural life, so long as government does not *endorse* any one or all religions.[3] *See Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (permitting government religious expression as "acknowledgment of beliefs widely held among the people of this country"). *See also County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989) (permitting government recognition of religious holiday as "a cultural phenomenon").

In short, if government is to mark and make room for cultural expression generally—and one can scarcely conceive of a government that does not—some government expressions will necessarily include religious elements. Such expressions are especially common in a vibrantly, religiously diverse society like ours. Accordingly, they are routinely permitted, subject to certain narrow limitations on the otherwise broad power of government to control its own message.

> institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks."

Alexis de Tocqueville, *Democracy in America* 293 (J.P. Mayer ed. 1966). *See also School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberger J, concurring) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion").

[3] The Establishment Clause does not generally forbid religious expression by government. *See, e.g., School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963) (noting that government schools may teach non-devotional courses on the Bible or religion, and that such courses are commendable). But the Establishment Clause does set certain *specific* parameters on such expression, in addition to the prohibition on endorsement discussed above, such as when it coerces compliance with religion, *see Lee* v. *Weisman*, 505 U.S. 577, 587 (1992), amounts to government proselytization, *see Santa Fe Indep. Sch. Dist.* v. *Doe*, 120 S. Ct. 2266, 2278 (2000), or otherwise excessively entangles government in religious affairs. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 613-14 (1971).

II. GOVERNMENT CULTURAL EXPRESSION IN THE UNITED STATES — HISTORICALLY, CURRENTLY, AND INCREASINGLY — REFLECTS THE FULL RANGE OF AMERICAN RELIGIOUS DIVERSITY.

Government cultural expression—in virtually every conceivable form—has included religious elements since the Founding. This phenomenon is not only long-standing and pervasive, but it has kept pace with the vast and ever-increasing diversity of religious faiths in America. What follows are some examples of government expression reflecting the breadth of that diversity.

A. Displays, Monuments, and Memorials

In 1966, Srila Prabhupada began reciting a Hare Krishna prayer under a tree in Tompkins Square Park in New York City, thus introducing his faith into American culture for the first time. On November 18, 2001, the City of New York's Department of Parks and Recreation dedicated a plaque to mark that tree as the "Hare Krishna Tree," and to commemorate the "founding of the Hare Krishna religion in the United States."[4]

The City of Mesa, Arizona dedicated a plaque to the memory of a Sikh murdered soon after September 11, 2001, simply because of his appearance and mistaken religious identity. Among other things, the memorial stated that, "Sikhs believe: In one God. That all religious paths lead to God. That all people are equal in the eyes of God. In peace,

[4] *See* Srila Prabhupada's Hare Krishna Tree, *available at* http://www.harekrsna.com/philosophy/acarya/newyork.htm (last visited Dec. 8, 2004).

and love for humankind."[5] The plaque was dedicated one year after the shooting at the "Embrace Diversity Memorial Event" sponsored by the City.

The federal government has made the Pueblo Bonito ruins in Chaco Canyon, New Mexico a national monument, in order to memorialize the main social and religious center of the Native American culture of the Anasazi.[6]

Similarly, in Hawaii, the federal government has extended special historic status two religious monuments, the Pu'ukohola Heiau Temple constructed in honor of the war god Kuka'ilimoku,[7] and the ancient Hawaiian cultural and religious site known as Kaloko-Honokohau.[8]

Sharon, Vermont is home to the Birthplace Memorial for Joseph Smith, Founder of the Church of Jesus Christ of Latter Day Saints.[9]

[5] *See* Balbir Singh Sodhi Memorial Dedication September 14, 2003 in Mesa, Arizona, USA, *available at* http://healingsource.com/sodhi/sept-14-2003/gallery/pages/med/100_med.html (last visited Dec. 8, 2004); Embrace Diversity Event to Offer Poignant Evening in Mesa, *available at* http://www.sikhnet.com/s/EmbraceDiversityNews (last visited on Dec. 8, 2004).

[6] Places of Peace and Power: The Sacred Site Pilgrimage of Martin Gray, *available at* http://www.sacredsites.com/americas/united_states/chaco_canyon.html (last visited Dec. 8, 2004).

[7] Puukohola Heiau National Historic Site, *available at* http://www.nps.gov/puhe (last visited Dec. 8, 2004).

[8] Kaloko-Honokohau National Historic Site, *available at* http://www.nps.gov/kaho (last visited Dec. 8, 2004).

[9] *See* Religion in Vermont, *available at*

Government museums such as the National Gallery in Washington, DC routinely display Islamic art,[10] as well as Buddhist and Hindu art.[11]

Government monuments and structures routinely depict Roman gods, such as the Roman Goddess of Liberty on the United States Capitol Building. Indeed, the Goddess of Liberty is one of the many monuments, along with the monument bearing the text of the Ten Commandments, on the Texas State Capitol grounds.[12]

Government buildings often reflect the religiosity of Americans, while respecting their religious diversity, by using generic references to God. For example, at the top of the Washington Monument in Washington, D.C. are the words, "Laus Deo" or "Praise Be To God." The Tomb of the Unknown Soldier in Arlington, Virginia contains the inscription, "Here Rests in Honored Glory an American Soldier Known but to God."[13]

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http://www.adherents.com/loc/loc_vermont.html (last modified Sept. 1, 2001).

[10] National Gallery of Art, Current Exhibitions: Palace and Mosque: Islamic Art from the Victoria and Albert Museum, July 18, 2004 - February 6, 2005, *available at* http://www.nga.gov/exhibitions/index.shtm#islamic (last visited Dec. 8, 2004).

National Gallery of Art, Past Exhibitions: The Sculpture of Indonesia1, July-4 November 1990, *available at* http://www.nga.gov/past/data/exh622.shtm (last visited Dec. 8, 2004).

[12] *Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2004). Whether through oversight or inconsistency in his views, Petitioner has not challenged this religious symbol in this case.

[13] The Tomb of the Unknowns, Arlington National

B. Commemorative Events and Holidays

In recent years, the White House has acknowledged a wide range of faiths by hosting events to commemorate significant religious holidays. For example, the White House:

- Recognizes Hinduism by inviting religious leaders for a celebration of Diwali;[14]
- Recognizes Islam by hosting an Iftar dinner during Ramadan;[15]
- Recognizes Judaism by lighting and displaying a menorah throughout Hanukkah;[16]
- Recognizes Sikhism by celebrating the 400th anniversary of Guru Granth Sahib with Sikh religious leaders and practitioners.[17]

Similarly, state and local governments celebrate cultural and religious diversity by marking and

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Cemetery, *available at* http://www.arlingtoncemetery.net/tombofun.htm (last modified on Apr. 10, 2004).

[14] Express India, *Diwali celebrated in White House*, (posted online Nov. 11, 2004) *available at* http://www.expressindia.com/fullstory.php?newsid= 38356.

[15] The White House, Ramadan 2003, *available at* http://www.whitehouse.gov/infocus/ramadan (last visited on Dec. 8, 2004).

[16] Menorah Lighting from the White House, *available at* http://www.whitehouse.gov/president/holiday/ hanukkah (last visited on Dec. 8, 2004).

[17] The Sikh Network, *400th Anniversary Sikh Celebration at White House a Success* (last visited on Dec. 8, 2004) *available at* http://www.sikhnet.com/s/AdiGranth WhiteHouse.

accommodating holidays and hosting festivals.

New Mexico Governor Bill Richardson recently declared October 23, 2004 as Yogi Bhajan Memorial Day in honor of the Sikh leader.[18]

Pearland, Texas recognized July 27, 1982 as Meenakshi Temple Day to commemorate the opening of the Hindu temple after the final consecration rituals were performed.[19]

The Jersey City, New Jersey government celebrates the Hindu New Year annually with the Grand Phagwah parade, and celebrates Ramadan to acknowledge the cultural contributions of Muslim members of the community.[20]

C. Flags, Seals, and Mottos

The official flags and government seals of states commonly contain religious elements.

State Flags:[21]

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[18] Sarb Nam Kaur Khalsa, *SikhNet News*, "New Mexico Governor Richardson Declares 'Yogi Bhajan Memorial Day'" (October 23, 2004) *available at* http://www.sikhnet.com/s/YBMemorialDay.

[19] Hinduism Today, *Inaugural Ceremonies Held for Sri Meenakshi Temple in Houston, Texas* (last visited on Dec. 8, 2004) *available at* http://www.hinduismtoday.com/archives/1982/08/ 1982-08-06.shtml.

[20] Court Oversteps Its Bounds In Jersey City, *available at* http://www.schundler.org/schundler/court_oversteps_its_bounds_in.html (last visited on Dec. 8, 2004).

[21] State Flags of the 50 States, *availabe at* http://www.netstate.com/state_flags.htm. (last visited on Dec. 8, 2004).

- Florida: Features state motto "In God We Trust."
- Georgia: Features state motto "In God We Trust."
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New Mexico: Features sun symbol sacred to the Native American Zia people.
- New York: Features Roman Goddesses of Liberty and Justice.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

State Seals:[22]

- Arkansas: Features Roman Goddess of Liberty.
- Arizona: Features state motto "Ditat Deus" or "God Enriches."
- California: Features Roman Goddess of Wisdom.
- Colorado: Features "Eye of God" and state motto "Nil Sine Numine" or "Nothing without the Deity."
- Florida: Features state motto "In God We Trust."
- Hawaii: Features Roman Goddess of Liberty.
- New Jersey: Features Roman Goddesses of Liberty and Agriculture.
- New York: Features Roman Goddesses of Liberty and Justice.
- North Carolina: Features Roman Goddesses of Liberty and Plenty.
- South Dakota: Features state motto "Under God the People Rule."
- Virginia: Features Roman Goddess of Virtue.

Similarly, the flags, seals, and mottos of local

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[22] State Seals of the 50 States , *available at* http://www.netstate.com/state_seals.htm (last visited on Dec. 8, 2004).

governments often contain religious aspects. The City of Boston, for example, adopted the motto "Sicut Patribus Sit Deus Nobis" or "God Be with Us as He Was with Our Fathers" and prominently displays this message on the city's flag and seal.[23]

D. Coins, Medals, and Stamps

It is well known and often repeated that the national motto, "In God We Trust," appears on American currency. But other coinage issued by the United States Mint contains religious elements as well.

For example, the Mint has issued three commemorative medals in honor of Catholic clergy: Pope John Paul II for his "many enduring contributions to peace and religious understanding";[24] John Cardinal O'Connor for his advocacy of interfaith healing particularly among Catholics and Jews;[25] and Father Theodore M. Hesburgh for his "outstanding and enduring contributions to . . . the Catholic Church [and] the Nation . . . ."[26] These coins bear

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[23] A View On Cities, Boston Pictures, *available at* http://www.aviewoncities.com/img/zzflags/us_massachusetts_boston-l.gif (last visited on Dec. 6, 2004).

[24] The United States Mint, The Pope John Paul II Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 5 (last visited on Dec. 8, 2004).

[25] The United States Mint, The John Cardinal O'Connor Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID= 10 (last visited on Dec. 8, 2004).

[26] The United States Mint, The Father Theodore M. Hesburgh Congressional Gold Medal, *available at* http://www.usmint.gov/mint_programs/medals/index.cfm?action=medal&ID=2 (last visited on Dec. 8, 2004).

witness to the dynamism of America's religious life and culture and how government expression appropriately responds to reflect that. Though Catholics were once a persecuted minority in this country, their contributions to American culture are now recognized and commemorated by the government.

Commemorative stamps routinely mark a wide variety of religious holidays and traditions. The United States Postal Service currently offers stamps for Kwanzaa, Hanukkah, Christmas, and Eid.[27] Commenting on the Eid stamp, the Postal Service's Vice President of Public Affairs and Communications explained that the purpose of the stamp was to "highlight the business, educational and social contributions of the estimated six to seven million Muslims in this country whose cultural heritage has become an integral part of the fabric of this nation."[28]

E. Declarations and Resolutions

Texas Muslims Legislative Day—an event in Austin, Texas hosted by state Representative Jerry Madden—is an effort by the Texas state government to actively include Muslims in the political process.[29]

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[27] Happy Holidays, usps.com/shops, *available at* http://shop.usps.com/cgi-bin/vsbv/postal_store_non_ssl/home.jsp (last visited on Dec. 8, 2004).

[28] Philatelic News, *Postage Stamp Celebrating Muslims Holiday to be Re-Issued* (Aug. 12, 2002), *available at* http://www.usps.com/news/2002/philatelic/sr02_052.htm (last visited on Dec. 8, 2004).

[29] Austin Area Interreligious Ministries, *For 9/11, Crossing the Divide* (Sept. 17, 2004), *available at* http://www.aaimaustin.org/news/9112004.htm (last visited on Dec. 8, 2004).

House Resolution 816, proposed in the 2nd Session of the 108th Congress on October 4, 2004, specifically acknowledges "the historical and cultural significance of Diwali"—celebrated by Hindus, Sikhs, and Jains in the United States—and calls on the President to officially recognize the holiday.[30]

Even before September 11, 2001, the United States Senate and House of Representatives proposed similar resolutions that recognized the Muslim community as "a vital part of our Nation, with more than 1,500 mosques, Islamic schools, and Islamic centers in neighborhoods across the United States."[31]

III. THE REASONABLE OBSERVER SHOULD BE DEEMED AWARE OF THE FOREGOING.

American governments inevitably engage in cultural expression; American culture inevitably includes diverse religious aspects; therefore, the cultural expression of American governments inevitably includes diverse religious aspects. And, as the numerous examples above illustrate, concrete experience confirms this abstract logic.

In short, any reasonable observer should be aware of the fact that government cultural expression in the United States commonly contains religious elements that acknowledge the contributions of America's diverse religious people to that culture.[32] And that fact should serve as the

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30 Recognizing the Holiday of Diwali, H. Res. 816, 108th Cong. (2004) *available at* //thomas.loc.gov; H. Cong Res. 174, 106th Cong. (1999) (enacted) *available at* http://thomas.loc.gov.

31 S. Res. 133, 108th Cong. (2003) (enacted) *available at* http://thomas.loc.gov.

32 *Cf. Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("B]ecause our concern is with *the political community writ large*, the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort . . . . It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [expression occurs]") (emphasis added).

context for evaluating whether any particular government expression that includes religious elements—such as the monument at issue in this case—passes muster under the Establishment Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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